IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 7, 2006

F.E. MOON v. LEE BUFF, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 05-0098 W. Frank Brown, III, Chancellor Sitting By Interchange

No. E2006-00758-COA-R3-CV - FILED MARCH 30, 2007

F.E. Moon ("Plaintiff") sued Lee Buff[1] ("Defendant") claiming, in part, that Plaintiff had acquired real property known as Courthouse Street by virtue of adverse possession. The case was tried without a jury. After trial, the Trial Court entered an order finding and holding, *inter alia*, that Plaintiff had not proven adverse possession and that Defendant, and any other adjoining property owners whose deeds refer to Courthouse Street and other unopened roads shown in the plat of record, had the right to use Courthouse Street and those other roads as a means of ingress and egress. Plaintiff appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

John C. Cavett, Jr., Chattanooga, Tennessee for the Appellant, F.E. Moon.

David H. Rotroff, Chattanooga, Tennessee for the Appellee, Lee Buff.

OPINION

Background

Plaintiff owns real property that borders on Lee Highway in Hamilton County. Defendant owns a parcel of real property located behind Plaintiff's property. The dispute that led to this lawsuit has to do with the right to use an unopened street, Courthouse Street, that runs along Plaintiff's and Defendant's property lines to access Lee Highway from Defendant's property.

[1] Plaintiff also sued Hamilton County, Tennessee claiming, in part, that Hamilton County was a necessary and indispensable party for purposes of determining if Courthouse Street constituted a public road. Hamilton County was dismissed from the suit prior to trial pursuant to an agreed order and the City of Collegedale, Tennessee was substituted in its place. The City of Collegedale, Tennessee, however, is not involved in this appeal.

Plaintiff sued Defendant claiming, in part, that Plaintiff had acquired Courthouse Street by adverse possession and that Defendant had no right to use Courthouse Street. Plaintiff also claimed that although Courthouse Street was designated as a public road on a recorded plat, no governmental authority ever had accepted this designation, and, therefore, Courthouse Street never became a public road.

The case was tried without a jury in October of 2005. At trial, Plaintiff testified that he is 52 years old and has lived in the area since he was a child. Plaintiff testified that when he was in high school in 1970, and 1971, the property he currently owns "was a gas station and they sold hamburgers and things like that." When Plaintiff was a child, there were cottages behind the gas station for rent. Those cottages were removed in the late 1970's or early 1980's. Plaintiff admitted that the only way to get to the cottages when they existed was to drive down Courthouse Street.

In 1986, Plaintiff's corporation acquired the property. When Plaintiff's corporation purchased the property, it contained a gas station and a video store. Plaintiff testified that the corporation continued to use the property for some time as a video store and gas station. In 1987, Plaintiff's corporation ceased operating the gas station and removed the gas tanks per the EPA. In 1990, Plaintiff's corporation deeded the property to Plaintiff.

Plaintiff testified that when his corporation purchased the property, there was a fence that crossed Courthouse Street that:

> was barbed wire and some of them were T post and some of them had the little wooden, cedar maybe, and then the tree line, you know, was right - - you know, cedar trees grow up between a fence row. There was a lot of those there.…Some of them were, I'd say, 25, 30 feet [tall] and some of them were smaller.

Plaintiff testified that Defendant removed the fence and further testified that there currently is a telephone pole in Courthouse Street.

Plaintiff claimed that from the time his corporation purchased the property in 1986, no one used Courthouse Street as a road or for access to any property. Plaintiff used his property for a time as a video store and a pawn shop and also has rented it to other people. Customers for Plaintiff's businesses drive on the portion of pavement that is on Courthouse Street to get to the business. Plaintiff also testified that the people that he has rented his property to have used Courthouse Street.

Plaintiff admitted that he saw a U.S. Xpress Enterprises vehicle parked on Courthouse Street, approximately one month before trial. Plaintiff never gave permission for that vehicle to park there. The U.S. Xpress Enterprises vehicle remained parked on Courthouse Street for three or four days or a week.

Joseph Hilborn, a building inspector and zoning official for the City of Collegedale, testified that he is familiar with Courthouse Street. Mr. Hilborn did research regarding Courthouse Street and testified that Courthouse Street "goes back to 1986…. [And that] Courthouse Street has never been abandoned." Mr. Hilborn utilized tax maps to show that at some point between 1997, and 2005, the back portion of Courthouse Street was abandoned, but that the upper part to Lee Highway, the portion that runs adjacent to Plaintiff's property and is at issue in this case, has never been abandoned. Mr. Hilborn testified that in order to abandon:

> Someone has to initiate what the municipality involved, a proceeding to abandon a right-of-way.…You have to have a public hearing and it has to be advertised to the public either by posting on the property or through a newspaper of some sort ten days in advance prior to the meeting. And then you have a public hearing to determine if it should be abandoned.…The property owners adjoining the property have to agree to the abandonment. At least in Collegedale's ordinance. Every single property owner that adjoins the property would have to be notified and have to agree in writing to the abandonment.

Mr. Hilborn reiterated that Courthouse Street has been a right-of-way since at least 1986, which means the public has the right to use it.

Arthur K. Poe owns approximately seven acres on Lee Highway close to the area in controversy. Mr. Poe testified that he is 64 years old and has been a lifelong resident of the Apison and Ooltewah area. Mr. Poe testified that he has been familiar with his property and the property involved in this lawsuit since he and his wife married in 1961.

Mr. Poe's wife's cousin once owned the property that now belongs to Defendant. Mr. Poe testified that his wife's cousin did not utilize her land, but that he cleared it off for her. In order to access his wife's cousin's land, Mr. Poe "would go down through [Defendant's] land and I'd just come across that ditch we were talking about. Both ways.…From Lee Highway, I'd go down just what was the right-of-way.…Courthouse Street." Mr. Poe utilized that access over a period of fifteen or twenty years and during that time, no one ever told him he could not use Courthouse Street. In addition, Courthouse Street never was posted as private property. Mr. Poe testified that although sometimes cars would be parked on Courthouse Street, they never blocked his access to his wife's cousin's property. Mr. Poe testified that if he wanted to access what was then his wife's cousin's property, and which now is Defendant's property, he would have to go down Courthouse Street because that is the only way to get there with an ordinary vehicle. Mr. Poe also testified that he viewed a recorded plat that was perhaps one-hundred years old at the Hamilton County Courthouse and saw Courthouse Street designated as a right-of-way on that plat.

Defendant testified that he is in the recycling business and that he leases property where he lives and operates his business from a Mr. Holbrook under a lease-purchase agreement. This leased property is across Courthouse Street from Plaintiff's property. Defendant also owns approximately one acre that sits behind Plaintiff's property.

Defendant testified that he asked Mr. Holbrook for a way of ingress and egress over Mr. Holbrook's land and Mr. Holbrook told Defendant he could use it only for a construction entrance. Defendant also asked Mr. Poe for a way of ingress and egress and Mr. Poe refused to let Defendant have one across Mr. Poe's property.

The property that Defendant owns is bordered on the one side by Courthouse Street and on the other side by Newton Street, which also was designated on the recorded plat as an unopened road. Defendant testified:

> Newton Street has got a stream down it that's been designated waters of the State by the EPA, all the way down the side of it.…From the other side of Lee Highway all the way down is designated waters of the State. The same as it is on this side, waters of the State.…You have to stay 25 feet away from it for construction or anything.

Defendant testified that Courthouse Street is the only access to the property he owns from Lee Highway.

After trial, the Trial Court entered its Memorandum Opinion and Order on November 30, 2005, finding and holding, *inter alia*, that both Plaintiff's and Defendant's deeds refer to Courthouse Street as a roadway, that Plaintiff and his predecessors in title have not had exclusive use of Courthouse Street, that other persons have used Courthouse Street to access Defendant's property and adjacent properties over the years, and that "[Defendant] (and any adjoining property owners and owners of real estate with deeds referring to these unopened roads, including Courthouse Street) shall have the right to use Courthouse Street (and these unopened roads) as a means of ingress and egress to his property…." The Trial Court's November 30, 2005, order dismissed Plaintiff's complaint with prejudice. Plaintiff filed a motion to alter or amend, which the Trial Court denied. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises two issues on appeal: 1) whether the Trial Court erred in finding and holding that an easement existed by virtue of a recorded plat if there was no use of the easement following the conveyances that referred to the plat; and, 2) whether the Trial Court erred in finding and holding that the easement created by the recorded plat was neither abandoned nor extinguished by adverse possession.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first address whether the Trial Court erred in finding and holding that an easement existed by virtue of a recorded plat if, as alleged by Plaintiff, there was no use of the easement following the conveyances that referred to the plat. In *Jacoway v. Palmer*, this Court explained:

> We believe the law is well established that when land is sold by reference to a plat upon which several streets and avenues are laid out, the grantee acquires an easement in the street or way upon which his lot is situated, and in such other streets or ways as are necessary or convenient to enable him to reach a highway. In every road dedication by plat there are two recipients of rights. Those recipients are the representative governing body and the abutting landowners who purchased on the promise of the plat. The fee does not rest in the governing body. *See State ex rel. Beckham v. Taylor*, 107 Tenn. 455, 64 S.W. 766 (1901). That body has the right to accept the dedication as a public trust and maintain the road. If the public body rejects that dedication, that fact does not affect the fee and remaining rights in the abutting landowner. The fee that is in the abutting landowner is subject to the easement rights of others. If there is a public acceptance of the road, the fee is burdened with the rights of the general public to use the land as a public road until such time as it is closed by public authority. *See State ex rel. Beckham v. Taylor, supra*. If there is not public acceptance there yet remains an easement upon the fee. The easement is a collective private easement. Each landowner who purchases under such a recorded plat is entitled to a private road easement over the lands shown as roads on the plat to their termines with public roads. Such easement is not one of necessity, but is one of convenience for which he and each adjoining owner paid.

Jacoway v. Palmer, 753 S.W.2d 675, 677 (Tenn. Ct. App. 1987).

Plaintiff's deed refers to the recorded plat. Defendant's deed does not specifically refer to the plat. However, Defendant's deed does specifically refer to Courthouse Street and the other unopened streets as shown in the plat, and Defendant's deed does refer to a survey that shows Courthouse Street and the other unopened streets. "It is clearly the law that persons who buy lots according to plats or plans whereon streets are marked or exist, acquire irrevocable rights to such streets." *Id*. at 678-79. Defendant purchased his lot according to a plan wherein a recorded plat marked streets and Defendant, therefore, acquired irrevocable rights to those streets.

Plaintiff does not contest the existence of the recorded plat that references several streets, some unopened, including Courthouse Street. Instead, Plaintiff argues that *Jacoway v. Palmer* refers to easements created by a recorded plat as easements of convenience, which Plaintiff argues "implies use." Plaintiff is mistaken.

In *Jacoway*, this Court clearly stated: "it has been repeatedly held that a mere nonuser will not amount to abandonment of an easement, but that there must be some positive showing of an intention to abandon." *Id*. at 677 (quoting *Cottrell v. Daniel*, 205 S.W.2d 973, 975 (1947)). Thus, *Jacoway* does not imply use, and whether Courthouse Street actually was used by Defendant's

predecessors in title is irrelevant on this issue. In any event, and as discussed more fully below, the Trial Court found that Courthouse Street has been used and the evidence does not preponderate against this finding. Plaintiff's argument as to this issue is without merit.

We next consider whether the Trial Court erred in finding and holding that the easement created by the recorded plat was neither abandoned nor extinguished by adverse possession.

As we discussed above, mere non-use of an easement is insufficient to constitute abandonment. *Id*. Instead, the party attempting to prove abandonment must show by clear and unequivocal evidence:

> not only an intention to abandon the easement but also external acts carrying that intention into effect. *See Cottrell v. Daniel*, 30 Tenn. App. at 343, 205 S.W.2d at 975. Thus, nonuse of the easement by the abutting landowner or landowners is not sufficient, by itself, to prove abandonment. Nonuse must be coupled with proof that the easement holder or holders intended to abandon the easement. *See Edminston Corp. v. Carpenter*, 540 S.W.2d 260, 262 (Tenn. Ct. App. 1976); *Cottrell v. Daniel*, 30 Tenn. App. at 344, 205 S.W.2d at 975. This intention may be proved with evidence of acts clearly indicating that the easement holder desires to lay no further claim to the benefits of the easement. *See State ex rel. Phillips v. Smith*, 34 Tenn. App. 608, 612-13, 241 S.W.2d 844, 846 (1950).

Hall v. Pippin, 984 S.W.2d 617, 620-21 (Tenn. Ct. App. 1998).

A careful review of the record on appeal reveals no acts by Defendant or his predecessors in title indicating a desire to lay no further claim to the benefit of the easement. Instead, the record shows that Defendant has utilized Courthouse Street and that others have used, and still are using Courthouse Street. Mr. Poe testified that he used Courthouse Street to access the property that once belonged to his wife's cousin and now belongs to Defendant. Plaintiff admitted that until the late 1970's or early 1980's cottages existed that were accessed by driving down Courthouse Street. In addition, the evidence that a U.S. Xpress Enterprises vehicle was parked on Courthouse Street shows that the public has used Courthouse Street as recently as one month before trial.

"When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings." *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)).

The evidence does not preponderate against the Trial Court's findings relevant to this issue. We find and hold that Plaintiff failed to prove abandonment by clear and convincing evidence.

We next consider whether Plaintiff acquired Courthouse Street by virtue of adverse possession. As this Court explained in *Wilson v. Price*:

> Adverse possession is the possession of real property of another which is inconsistent with the rights of the true owner. The underlying idea of the doctrine of adverse possession is "that the possession should be maintained in an open and notorious manner, so as to warn the true owner that a hostile claim is being asserted to his land." *Bensdorff v. Uihlein*, 132 Tenn. 193, 177 S.W. 481, 483 (Tenn. 1915). In order to assert adverse possession, a party must demonstrate that her possession has been exclusive, actual, adverse, continuous, open, and notorious for the required period of time. *Hightower v. Pendergrass*, 662 S.W.2d 932, 935 n.2 (Tenn. 1983). In Tennessee, twenty years is the prescriptive period for common law adverse possession without color of title. If a party has adversely possessed the land for the prescriptive twenty-year period, title vests in that party. *Cooke v. Smith*, 721 S.W.2d 251, 255-56 (Tenn. Ct. App. 1986). The burden is on the party claiming ownership by adverse possession to demonstrate the requisite elements by clear and convincing evidence. *O'Brien v. Waggoner*, 20 Tenn. App. 145, 96 S.W.2d 170, 176 (1936).

Wilson v. Price, 195 S.W.3d 661, 666-67 (Tenn. Ct. App. 2005).

The Trial Court found that the proof showed that Plaintiff and his predecessors in title had not had exclusive use of Courthouse Street. As discussed above, Defendant and Mr. Poe both testified to their use of Courthouse Street and the evidence shows that the public also uses Courthouse Street. The evidence does not preponderate against the Trial Court's findings relative to this issue. Plaintiff did not prove adverse possession of Courthouse Street by clear and convincing evidence.

We affirm the Trial Court's November 30, 2005, Memorandum Opinion and Order.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, F.E. Moon, and his surety.

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D. MICHAEL SWINEY, JUDGE